153 U.S. 535

EXTRACTS FROM RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1166.

F. P. MILLER, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 10, 1894.

Assignment of Errors. Filed Dec. 26, '92.

In the District Court, Dallas County, Texas.

THE STATE OF TEXAS
vs.
F. P. MILLER. } 17020.

Now comes the appellant, F. P. Miller, and assigns the following errors apparent of record, for which he asks that said cause be reversed and remanded, to wit:

I.

That the conviction of murder in the first degree is unsupported by the evidence, in that it does not appear with the requisite legal certainty that the homicide was committed upon express malice, and the great preponderance of the evidence, if not the uncontradicted evidence, shows that it was committed under such circumstances as to justify the act or, in any event, to exclude the theory of a killing with a sedate mind and formed design, and the verdict considered in connection with the evidence and the charge tends to show passion or prejudice on the part of the jury and suggests that they were unable to lay aside the opinions and prepossessions to the effect that they had formed a conclusion in relation to the guilt or innocence of the defendant with which many of them, confessedly, entered the jury-box.

That the counsel of the State in his argument to the jury, over objection and without evidence therefor, improperly and repeatedly referred, in effect, that defendant was cohabiting with a negro woman and that he was the father of a negro child, and in his argument stated to the jury, in effect, that the death penalty had been assessed against a negro a week or two before in Judge Burke's court for a like offense, and by which remarks the jury may have been and probably were unfavorably and improperly influenced.

II.

The court erred in overruling the defendant's application for continuance, as shown by his bill of exceptions No. 3, and in its rulings in relation to the organization of the jury, shown by defendant's bill of exceptions No. 1.

And in relation to the improper remarks of counsel, as shown by his bill of exceptions No. 2.

III.

That the court erred in admitting, over objection as being irrelevant, incompetent, and hearsay, the testimony of Early, Miller, and Lemar in relation to the purpose of Early and Riddle to arrest defendant without a warrant for carrying a pistol and raising a disturbance upon a communication made to them after the completion of the offense and the return of defendant to his shop, and the

statements of Miller and Connerty to Early and Riddle as to the dangerous character of defendant, the inquiries and conversations of Early and Riddle with others and between themselves in relation to the dangerousness of defendant and the method and purpose of securing his arrest, as shown by defendant's bill of exceptions No. 4.

IV.

That the court erred in its charge relating to murder of the first degree and to self-defense and manslaughter in the following particulars, pointed out in the defendant's exceptions thereto, to wit:

1. That the seventh paragraph, relating to murder in the first degree, erroneously instructed that the killing would be upon express malice if the circumstances, &c., "indicated a sedate mind and formed design to kill or do great bodily injury," instead of instructing that such sedate mind and formed design must be established as a fact beyond a reasonable doubt.

2. That the 25th paragraph of the charge, relating to the law of retreat, erroneously confined the rule to the issue of self-defense, said error not being elsewhere corrected in the charge, and denied its application to the presumption arising from an attack made with a deadly weapon and to the reasonable appearances of danger from the defendant's standpoint.

3. The 27th paragraph of the charge limited the defendant's right to act to the things done at the time of the killing and excluded the consideration in connection therewith of the antecedent threats and other acts of Riddle and Early.

4. That the 28th paragraph of the charge was erroneous in the following particulars, to wit:

1. That it denied the right to justify if the defendant drew his pistol and fired for the purpose of killing Riddle or Early, without reference to their own unlawful and threatening acts and conduct, real or apparent, at the time or before.

2. It denied the right to justify if the killing was done for the purpose of preventing them from lawfully arresting him, without reference to their own unlawful and threatening acts and conduct, real or apparent.

3. It failed to predicate self-defense in an affirmative form upon the issue of an illegal arrest.

4. It failed to inform the jury what would constitute a legal arrest and to submit that issue to them.

5. It denied the right to defend against apparent as well as real danger; and

6. It limited and restricted all other charges on self-defense by the erroneous tests laid down in the paragraph complained of.

5. The court erred in its charge in the 12th, 14th, 15th, 21st & 22nd paragraphs thereof in relation to the law of manslaughter, as shown by the defendant's exceptions thereto, to wit:

1. That the 12th paragraph erroneously limits the provocation to one arising at the time of the killing, and withdraws and excludes from the jury all antecedent and connected facts which,

under the law, should have been submitted in connection with the provocation given at the time, in determining its sufficiency as adequate cause and the existence of passion arising therefrom.

2. And said paragraph erroneously excluded the consideration of passion arising from any other provocation or any provocation given by some person other than Riddle, the party killed, and excluded the provocation given by Early, acting with Riddle, either of itself at the time or in connection with antecedent facts

3. And erroneously admitted there or elsewhere, in defining sudden passion, to instruct that the last provocation is presumed to be the moving cause of the killing when left to presumption.

4. The 14th and 15th paragraphs of the charge, defining "adequate cause," while otherwise correct, is construed in the light of and in connection with the said 12th paragraph, whereby the issue of "passion" and "adequate cause" is erroneously confined alone to the acts of Riddle at the time of the killing and to the passion engendered thereby, and excluded from consideration the acts of Early at the time in connection with the antecedent facts and circumstances as grounds of provocation and as the moving cause for passion.

6. That the 21st and 22nd paragraphs of the charge, in the application of the law of manslaughter, erroneously confined the consideration of "passion" and "adequate cause" to the definition thereof, as given in the abstract in the 12th charge hereinbefore complained of, and thereby emphasized the errors thereof, and denied and excluded the consideration of antecedent facts, the acts of Early, and the circumstances at the time in determining the issue of adequate cause and passion, and thereby and therein erroneously predicated the issue of manslaughter alone upon the acts of Riddle at the time of the killing.

7. That the court erred in the 17th, 18th, and 24th paragraphs of the charge in relation to the law of arrest, and in the 23rd paragraph of the charge in relation to manslaughter, as shown by the defendant's exceptions thereto, to wit:

1. That the 17th paragraph of the charge erroneously assumed that the defendant was violating the law if he had a pistol on the street the day before the killing, and that defendant had committed such violation.

2. And erroneously submits the legal right to arrest therefor without warrant upon information to the officers by a credable person, there being no proof that any credible person imparted such information, and therefore no authority was shown in the officers to arrest without warrant.

3. And erroneously authorized an arrest without warrant for a past and complete offense, when the law authorized such arrest only in case of a present and continuing offense or upon information of a credible person that such offense is being committed.

4. And erroneously failed to charge the law affirmatively in accordance with the facts, in that the offense, if any, was past and completed, and not being committed when the officers were informed thereof and so known to them at the time of such informa-

tion, and in failing to charge that no legal arrest could be made without warrant under the facts of the case.

8. That the 18th paragraph of the charge erroneously assumed the existence and truth of the facts stated in the 17th paragraph, and that the officers, Early and Riddle, were making and were authorized to make the arrest at the time of the killing.

1. And erroneously instructed the jury, in effect, to determine from their own standpoint whether the officers were using more force than was necessary to arrest defendant, and denied to defendant the right to be judged from his standpoint and on the facts apparent to him at the time.

9. That the 24th paragraph of the charge erroneously assumed the fact of the attempted arrest and its legality, and that it was the purpose of Riddle and Early to communicate to defendant the authority by which they sought to arrest him, and that such purpose was prevented by defendant firing his pistol.

1. And erroneously failed therein or elsewhere to charge that if Riddle and Early had no purpose of informing defendant of their official capacity and authority under which they proposed to arrest, or if the want of opportunity to so state was owing to their own acts and the same indicated menace or appearance of danger to defendant from his standpoint, that the same in connection with the antecedent circumstances should be considered in determining the issues of self-defense and manslaughter.

10. That the 23rd paragraph of the charge, in the application of the law of manslaughter, erroneously limited the consideration of "passion" and "adequate cause" to the acts of Riddle or Early at the time of the killing, and excluded from consideration all antecedent facts and circumstances in connection with the acts of the parties and the appearances to the defendant at the time in determining the issue of manslaughter.

1. And erroneously assumed that Riddle and Early were attempting to arrest the defendant and ignored the issue of fact as to the lawfulness of their purpose, and that the want of time and opportunity, if any, to declare the authority under which the arrest was attempted resulted from the wrongful acts of the officers, and the charge erroneously failed to instruct the jury as to the issue of the absence of such time and opportunity resulting from the wrongful purpose or acts of the officers in connection with the appearances at the time to the defendant in determining the question of manslaughter.

2. That said 23rd paragraph erroneously emphasized the errors and defects in the 17th, 18th, and 24th paragraphs of the charge upon the right to arrest, the duty of an officer in making an arrest, the failure of duty and non-compliance with the law in arrest when brought about by the acts of the officer, the force necessary to arrest viewed from the standpoint of the officer and not as the same appeared to the defendant.

3. That said 23rd, 17th, 18th, and 24th paragraphs of the charges emphasized the errors and restrictions in the 12th, 14th, 15th, 21st, and 22nd paragraphs, and the same in connection therewith failed

to submit affirmatively and correctly the law of manslaughter under the facts of the case.

V.

The court erred in refusing the defendant's several written requested special instructions relating to the law of manslaughter, as shown by his bill of exceptions number seven, and in refusing his several written requested special instructions relating to the law of arrest and self-defense, as shown by bill of exceptions number eight.

VI.

The premises considered, appellant prays that said case be reversed and remanded.

BASSETT, SEAY & MUSE,
Att'ys for the Appellant, F. P. Miller.

Filed Dec. 28, 1892.

J. H. STEWART,
Clerk Dist. Court.

Opinion of the Court.

In Court of Criminal Appeals, Dallas Term, 1893.

1st.

F. P. MILLER
vs.
THE STATE. } No. 91.

Appeal from Dallas county.

On the 17th day of June, 1892, F. P. Miller, the appellant, shot and killed W. H. Riddle in the city of Dallas. He was indicted for murder on the 18th day of June and was tried and convicted on the 23rd day of July, 1892, the verdict and judgment being for murder in the first degree with the death penalty assessed.

Counsel for appellant submitted an able oral argument and elaborate brief assigning numerous errors as reasons for reversing the judgment. We have very carefully examined all the errors relied upon by counsel, but will notice in this opinion such as we deem of importance.

1. Error is assigned relating to the empanelling of the jury. It is urged that Morgan was disqualified, and that he sat in judgment upon appellant's case. S. T. Morgan, being called, on cross-examination by defendant, stated that he had formed a conclusion in relation to defendant's guilt, but that the same would not influence his verdict; that it would require evidence to remove his opinion, but that his verdict would not be influenced thereby. He had no bias or prejudice in favor or against the defendant; that he had read and heard of the meeting of the citizens at the city hall advising the lynching of the defendant; also of the attack upon the jail;

that he did not approve of mob law in this case, but did approve of mob law in some cases. If Morgan had reached the conclusion that defendant was guilty, was this a fixed and settled conclusion? If so, he was disqualified. Was his opinion so entertained as to become a fixed belief of the appellant's guilt? If so, he was not competent to try the case.

In ascertaining the character of his conclusion the source of the juror's information becomes of the first importance. Had he witnessed the transaction? Was he informed of the facts; talked with a witness or witnesses; read a statement of the evidence, or was his opinion founded upon vague rumors? None of these questions are answered by this record, and hence we are not prepared to reverse the ruling of the learned judge who tried this case.

2. Appellant applied for a continuance of the case which was denied, and he assigns this for error. There are two grounds set up, 1st. "That there exists in Dallas county a dangerous combination against him, instigated by influential persons, which will defeat a fair and impartial trial of this case at this term;" 2nd. "That defendant cannot safely go to trial without the testimony of Mrs. Kirkham and E. A. Kirkham." By these witnesses appellant expected to prove his good reputation. This is no ground for a continuance; "that parties whose names cannot now (at time of trial) be recalled by defendant, came to his shop and told him that the police of the city of Dallas would do him up and kill him; that defendant was greatly alarmed and disturbed thereat, and on account thereof armed himself for protection; that defendant expressed his apprehenson of injury and requested that the witnesses, should they hear parties in his house, to awaken and notify him; that said witnesses lived in the same house with him and that he was their tenant."

This application is greatly wanting in particularity and specification. What policemen in Dallas threatened to kill defendant? Did Early or Riddle make threats? When were the threats made and when were they communicated to appellant? Were they made just before or one or two years prior to the homicide? "Appellant was greatly alarmed and armed himself for protection." When did he arm himself? A short time before the killing or a long time prior thereto? We are not informed on these facts. He may have been informed that the police of Dallas intended to kill him, became greatly alarmed, armed himself, and subsequently learned that he was in no danger and become perfectly cool and deliberate. It is passing strange, indeed, that appellant nor those with whom he lived and heard the parties inform defendant of the threats of the police of Dallas should forget the names of his informants.

If Mrs. Kirkham and E. A. Kirkham heard some persons inform appellant of the threats made by the policemen of Dallas, very slight diligence would have ascertained the names, and those persons would in all probability have been obtained. Were Mr. and Mrs. E. A. Kirkham questioned in regard to this matter? This is not shown. This application is so indefinite and wanting in specification as to render it wholly insufficient. Matters relating

to the conduct of the mob are also included in the application for continuance. The mob assembled on the day of the homicide, viz., the 17th day of June, '92, and the trial was had on the 23rd day of July, more than a month thereafter. Was the influence of the mob present or probably present with the jury? Can we reasonably infer that the jury was influenced by the mob? If so, appellant would have had a very strong equitable, not legal, ground for continuance. There was no attempt to show that there was improper conduct either by word or act from any source at the time of the trial. Again, this matter is not a ground for continuance, but for a change of venue, and if a motion had been made to change the venue of the case the State could have, perhaps, answered and shown by proof that in fact there was nothing to prevent a fair and impartial trial.

3. Over objection of defendant the State introduced in evidence the testimony of Early, Miller, and Lemar "in relation to the purpose of Early and Riddle to arrest defendant without a warrant for carrying a pistol and raising a disturbance, upon a communication made to them after the completion of the offense and the return of the defendant to his shop, and the statements of Miller and Connerty to Early and Riddle as to the dangerous character of the defendant, the inquiries and conversations of Early and Riddle with others and between themselves in relation to the dangerousness of the defendant and the method and purpose of securing his arrest."

The State's witness, Early, was permitted to testify "that on the night before the killing witness and the deceased, Riddle, were informed by D. L. Wilson that the defendant had been carrying a pistol on his person in the street that evening, and that he was cursing and threatening to kill any d—n policeman who should attempt to arrest him. The fact was communicated to Riddle and me an hour or two after its occurrence and after defendant had returned to his shop. We determined to arrest him at that time and with that intention went to Connerty's saloon, which was on the opposite side of the street, to reconnoitre, but the defendant's shop was dark, the lamps not being lighted, and we concluded to postpone the arrest until next day on Connerty's advice. Connerty said the defendant was a bad man and that we were liable to get hurt. On the following morning, at about ten o'clock, Riddle and I came again in the same neighborhood for the purpose of arresting defendant. We first went to the neighboring barber shop and inquired of the barber and his assistant if they had witnessed the occurrence of the evening before. They answered that they had not. We then went into George Miller's saloon where we made similar inquiries. Riddle and Miller talked together privately, and I did not hear what was said. On Riddle's return to where I was he said, 'All right; we will go and get him,' and we left the saloon to go to the defendant's shop. As we left the saloon I said to Riddle, 'We had better draw our pistols so as to have an equal break with him.' Riddle said, 'All right,' and took his policeman's club out of its scabbard. I took out my pistol. On *out* way from the

saloon to the defendant's shop, a distance of seventy or eighty feet, we carried our weapons in our hands, hugging the wall so as not to be seen by him. The defendant was not present at any of the conversations or occurrences referred to."

The defendant objected to the evidence as a whole and to each and every part thereof on the ground that it was hearsay and incompetent and irrelevant and threw no light on the conduct and motives of the defendant in the commission of the alleged homicide, but his objection was overruled and the evidence admitted, to which he duly excepted.

These facts were clearly competent, made so by the acts and threats of the defendant. The day before the killing the defendant was on the streets with a pistol, unlawfully cursing and swearing that he was going to kill the first officer who passed his shop. He said, "They have been prowling around my place long enough and have been bothering me, and I am not going to stand it any longer. I don't care if I die; I am going to shoot one or two of them before I do. I am not drunk or crazy, but mean just what I say." To Miller he stated the day before the homicide, with pistol in hand, that he was "looking for those blue-coated sons of b—s;" that they had been bothering him for some time; that they did not do anything else but lie around the saloon and drink whiskey, and that he wanted to kill them and kill himself. Defendant did not mention their names, but said they were "the policemen on that beat."

4. It is evident that defendant's conduct in carrying the pistol and deadly threats aimed at Early and Riddle caused them to approach defendant's shop with their arms ready for use if necessary, and when defendant saw them approaching (if in fact he saw them approaching) with their arms ready for use, or when Early appeared in front of his door with pistol in hand, defendant had no right to apprehend unnecessary violence from either Early or Riddle. Why? Because his own conduct and threats made it imperatively necessary for these officers to be thoroughly prepared and strictly on the *qui vive*.

That the defendant was expecting the officers to arrest him at any moment is also evident, for he was prepared, having his pistol in a position for immediate use and prompt action.

5. Errors are assigned upon the charge of the court. We desire to say that we have very carefully examined the charge in this case with reference to every phase of the case which was supported by any testimony in the record, and it is our opinion, when taken as a whole, it is a most admirable application of the law to every feature of the case. It was sufficient without the requested instructions given, but those given at the request of defendant rendered it absolutely unquestionable.

6. Counsel for appellant contend that the attempted arrest was unlawful: 1st, because it was shown that those who informed the officers that defendant had been guilty of unlawfully carrying a pistol were not credible persons; 2nd, that defendant was not carrying the pistol at the time the officers were informed. To authorize

an arrest for this offense it is not required that the offense is being committed at the time that the officers are informed thereof. The law presumes a citizen to be a credible person.

7. Counsel for appellant contend earnestly that the evidence does not warrant a conviction for murder in the first degree.

We will discuss this question from two points of view: 1st, that the attempted arrest was illegal; 2nd, that it was legal. A man will not be justified if he kill in defense against an illegal arrest of an ordinary character, yet the law sets such a high value upon the liberty of the citizen that an attempt to arrest him unlawfully is esteemed a great provocation, such as may reduce a killing in resistance of such an arrest to manslaughter. But while this is the general rule, yet the killing may be done under such circumstances of deliberation or cruelty as will afford proof of express malice, in which case it will be murder of the first degree. Calvin *vs.* State, 6 Colw. (Tenn.), 292; Roberts *vs.* State, 14 Mo., 146. As when the killing be done with a weapon deliberately prepared beforehand to resist the illegal arrest. Rex *vs.* Patience, 7 Car., & Pay., 775.

A is expecting an attempt will be made to arrest him illegally; he deliberately prepares his arms for immediate use; calmly and deliberately determines to kill the person who attempts the arrest. B appears with intention of making the arrest; A immediately shoots and kills B, A would be guilty of murder upon express malice, though the intended arrest was illegal. To hold A guilty of murder upon express malice would not only be law, but common sense and justice. Apply the facts of this case to this rule of law, we would hesitate before reversing the judgment for insufficiency of the evidence, though the attempted arrest was unlawful; but the attempted arrest was legal; it was the duty of the officers to make it. A failure to do so, under the facts of this case, would have made them amenable to a fine by the penal code. But it is urged by counsel that the arrest in this case was attempted in a wanton, violent, and unreasonable manner, such as reasonably created in the mind of defendant apprehension of death or serious bodily harm, and that defendant, acting upon such apprehension, would not be guilty of murder in the first degree.

If this proposition is supported by the evidence the conclusion would be correct, for under such a state of case the accused would be justified or would not be guilty of a higher grade of culpable homicide than manslaughter. In support of this proposition counsel rely, 1st, upon the manner in which Early and Riddle approached the shop, namely, with arms prepared and ready for immediate use. It was the duty of these officers to arrest appellant, and we have seen that he made it absolutely necessary for them to be prepared to prevent the execution of his deadly threats to take their lives; hence the fact that the officers approached his shop with arms drawn was no ground for serious apprehension of life or body of defendant, for he could have expected nothing else but thorough preparation on their part to protect themselves against the execution of his oft-repeated threats to kill them.

2nd. Counsel assign and rely upon the fact that Early shot at

appellant first or attempted to shoot first, and, this being so, we should attribute the killing to this provocation and not to the previous malice. This is a correct proposition, but how about the fact? Did Early or Riddle shoot or attempt to shoot first or make the first demonstration showing an intention to use a deadly weapon? Upon this point Early says: "Just as I stepped up in his doorway defendant looked up (he was sitting on a low chair right in front of the door); he was sitting on his work-bench, but I could see his hand easy, and just as he saw who we were he made a dive down by his side, grabbed his pistol, and just as soon as I saw him do that I raised my pistol and pulled the trigger, but it only cocked half way and would not fire, and the next instant there was a flash in my face, and it staggered me. The flash in my face was a shot from a pistol in the hands of the defendant."

Now, if Early tells the truth, the defendant, without any sort of doubt, was the aggressor. When he saw the officers he "dived for his pistol," kept ready at hand and evidently for the purpose of executing his threats of killing the first policeman who passed his door. When he reached for his pistol Early, under the circumstances of this case, had the right to shoot him, and so had Riddle. The acts and threats of appellant made it the duty of Early and Riddle, 1st, to arrest Miller; 2nd, made it absolutely necessary for them to prepare to prevent Miller from murdering them. They were in the right; Miller was in the wrong. They were performing a duty required by law, with a penalty for a failure to perform it. Miller expected the arrest. He knew that he had violated the law and would be arrested if he did not prevent it by killing the officers. He sought and was prepared for the issue, and his preparations were made coolly and deliberately, and the issue was one of life and death, and when the crisis came he acted at once without provocation, but evidently upon his previous malice, as was expressed by his deadly threats made directly against "that gray-headed son of a bitch, Riddle," and by other facts.

We are therefore of opinion that this was a case of calm, deliberate, premeditated murder, without one mitigating circumstance. Appellant entertained a deep-seated and malignant hatred for Early and Riddle; evinced a great desire to have an opportunity to slay them; acted in a defiant and lawless manner to induce them to attempt his arrest; coolly and deliberately prepared and had ready for immediate use his deadly weapon; was expecting the arrest, and, when the issue came, without provocation opened fire upon them, which resulted in the death of Riddle.

For this homicide a jury of his county, under a full and fair exposition of the law, found him guilty of murder in the first degree and assessed the death penalty.

We have given his case a thorough investigation, such as the penalty demands, but must say that there is no such error presented in the record as would justify this court in reversing the judgment, and it is affirmed.

J. M. HURT,
Presiding Judge.

Judges all present and concurring.

Filed in court — criminal appeals at Dallas this 21 day of Jan'y, 1893.

W. A. HUDSON, *Clerk.*

Filed in court of criminal appeals Mar. 31, 1893, at Austin, Texas.

P. WALTON, *Clerk.*

Amended Motion for Rehearing.

F. P. MILLER
vs.
THE STATE OF TEXAS. } No. 91.

Pending in the court of criminal appeals at Dallas.

Now, at this time, comes the appellant, F. P. Miller, and, leave of the court being first had and obtained, files this his amended motion for a rehearing in this cause and prays the court to grant him a rehearing for the reasons in this motion set forth.

I.

Summary of Facts.

The facts of this case are so strikingly different from nearly all cases hitherto reported of cool, sedate, and deliberate killing, where the death penalty has been assessed, that it is deemed best to briefly state the evidence. Ordinarily, in cases of lying in wait or assassination or other killings upon preparation, design, and deliberation, the victim is at his usual work or around his home and the assassin creeps upon him. In this case the alleged murderer was working quietly in his own home and at his usual work-bench and the victims crept upon him. Ordinarily the victim is found with tool or implement of industry in his hand and the murderer with deadly weapon surprises him. In this instance the alleged murderer was using the awl and hammer, with a shoe on his lap, and the victims surprised him with drawn weapons in their hands—pistol and club. Ordinarily the victim is sought for and surprised by the murderer, who springs suddenly upon him; but in this instance the alleged victims seek and surprise the murderer. Ordinarily the murderer haunts and dogs the victim, who is in fear and anticipates danger; but in this instance the evening before the murder the alleged victim says, "All I want is to get my hands on him," and the alleged murderer says the same evening, "They have been prowling around and bothering me until I don't care if I die. I am not drunk, but crazy. I will kill them and kill myself." Ordinarily the murderer sentenced to hang cannot prove himself a peaceable, quiet man, but this alleged murderer proved by the State's witnesses that he had been always regarded as a peaceable, good citizen, never having had any trouble but this. True his character was damaged before the jury by the statements (over defendant's objection) of two men who were "tat-ling" between the officers and defendant that he was a bad and dangerous man, but no sworn witness stated it.

The salient facts of this case can be grouped as follows. They are proven almost entirely by State's witnesses and are generally uncontradicted:

1. The afternoon before the killing, appellant was on the street, a short distance from his shop, carrying a pistol openly in his hand.

2. Just prior to his going out on the street he was told, while in his shop, of Riddle, the deceased, saying, "All he (Riddle) wanted was to get his hands on Miller."

3. In his shop, and also after going out on the street with the pistol, he was angry and much excited, charging the officers with having bothered him and worried the life out of him while he tried to behave himself and attend to his own business, and said if they kept on worrying him that he would kill them and blow his own brains out.

4. That his pistol was carried back to his home the evening before.

5. That the officers were informed of his carrying a pistol on the same evening that it occurred, after the misdemeanor was completed and the defendant and his pistol were both back at home.

6. That the officers had from the time that afternoon until the homicide (about 11 o'clock the next day) to obtain warrants of arrest, but they made no attempt to obtain a warrant.

7. The deceased, Riddle, and his companion, Early, drew their weapons; Early a large 45 pistol, and Riddle his club. They intend to surprise Miller, who is at work, "hugging the wall so as not to be seen by him." Early leads, he says, with pistol exposed, but George Miller says he hid it behind his — till he got to the door.

8. The officers did not notify appellant of their intent, but intentionally concealed their motives, and defendant was compelled, upon the instant, with a pistol flashing in his face, to infer their motive whether to kill him or overpower him. The last he had heard of a motive was Riddle's expression, "All I want is to get my hands on him."

9. At this point the facts are not uncontradicted. Early says that when appellant saw him that the appellant made a dive for his pistol; that he, Early, attempted to cock his pistol, but he only got it partly cocked, or else he might have fired first. Appellant, sitting in his chair, fired. Early fell, rolled off of the sidewalk, and retreated. Riddle, holding the club in his hand, drew his pistol and stepped to the door (on the east side), his pistol hand being extended out of sight of the witnesses. Appellant fired and Riddle fell. Early is a deeply interested witness. Had he admitted that he fired before Miller made a demonstration, he would be guilty of felony. An examination of the plat will show that the two balls, which struck appellant's west wall and cut his tools hanging thereon, must have been fired from the point where each, Early and Riddle, stood when they were fired at. A chamber of Riddle's pistol was freshly emptied. They could not have been fired by these men after appellant fired at them, for each one fell as appellant fired at him. The physical facts demonstrate that Early and Riddle each fired at appellant before appellant fired at him.

10. No explanation is given or attempted as to why the *the* officers did not obtain a warrant or why they did not openly arrest defendant and notify him of their purpose, except that it is attempted to be shown that the officers, from their standpoint, believed themselves in danger. This fear (if such existed on the part of the officers) was based, to a large extent, upon evidence hearsay in its nature, consisting of remarks made by Geo. Miller and Connerty that appellant was a bad and dangerous man. Such evidence having been objected to by appellant, he not having been present, and this explanation is made very weak by the fact that Geo. Miller, Earl Roberts, and other State's witnesses, when under oath, gave appellant an excellent character for industry, peace, quiet, and sobriety.

11. There is no proof that the person who informed the officers that appellant carried the pistol was a credible person. All that we know from the proof about George Miller, upon whose information they acted, is that he was a saloon-keeper.

II.

Propositions of Law.

The above statement of the facts, being, as appellant believes, a correct summary of the evidence in reference to the facts preceding and surrounding the homicide, calls for a decision upon the following most vital principles guaranteed to appellant and to the whole people by the Constitution of the United States, the constitution of the State of Texas, by legislative acts and judicial expressions:

(1.) The right or power of the officers of the law to enter the home of the citizen, the restrictions and limitations upon said power, and the rights of the citizen when his home is so invaded.

(2.) The constitutional right of a citizen to be secure in his person, houses, papers, and possessions from all unreasonable seizures (arrests) and searches.

(3.) The right of the citizen to bear arms.

(4.) The constitutional requirement that even when warrants are issued for the arrest of a citizen they must be based upon oath or affirmation.

(5.) And especially the principle as to whether or not a citizen can be arrested on a charge of misdemeanor long after the same is alleged to have been committed, the citizen thus attempted to be arrested being quietly engaged at his home, and the only information justifying the invasion of his home having been given by a person not shown to be credible and given after the commission of a misdemeanor when there is no attempt at escape and with ample time for the officers to have secured warrants based upon the oath of credible persons.

(6.) And in case of attempted arrest without warrant and by the use of deadly weapons, whether the presumption of the law will be with the citizen and in favor of his liberty or will it be with the

officer and in favor of the credibility of -is informant and the use of his deadly weapons.

(7.) When the liberty of a citizen is threatened and human life is taken by such citizen, when the party so endeavoring to deprive the citizen of his liberty and losing his life is not acting under a warrant, is there any presumption to be indulged in against such citizen in favor of the officer or the authority under which he claims to act or in favor of the credibility of the informant or information by virtue of which the officer acts in depriving the citizen of his liberty, either at the time of his arrest or on his trial for the homicide?

(8.) Under circumstances as above set forth does not the general presumption in favor of the innocence of the prisoner apply?

(9.) Under the above facts and the language of this court, there arises the question as to the admissibility of the *of the* conversations of the officers between themselves and with other persons in regard to appellant, appellant not being present, and such hearsay remarks (more hurtful to appellant than any like amount of sworn testimony) not having ever been communicated to him.

(10.) The law of manslaughter and the charge of the court thereon raising squarely the question as to what acts, facts, and circumstances are to be considered by the jury in the efforts to decide what was the condition of appellant's mind when he was confronted so unexpectedly by the officers with their drawn weapons.

III.

As to the Constitutional and Statutory Laws of Arrest.

Arrests of citizens without warrant are obnoxious to the spirit and genius of our laws, and the constitutional provision against such arrests, both in our State and Federal constitutions, are broad and sweeping. Such arrests are allowed in but few instances and in cases of emergency, and in such instances the law provides that the party making the arrest can only act upon his own knowledge or upon information of a credible person.

Therefore appellant respectfully suggests that it is serious and dangerous error for this court to hold, as it has done in this case, that the law presumes such informant to be a credible person, thereby dispensing with proof on this point. Especially is such holding dangerous in a case of the character of this, for it becomes a presumption, first against the liberty and then against the life of the citizen. Appellant further begs leave to suggest that it is dangerous to the liberty of the citizen and contrary to our constitutional law to hold that a citizen can be lawfully arrested for a misdemeanor without affidavit or warrant, where no escape is being undertaken and where the information is received and the arrest undertaken long after the alleged commission of the offense. The pistol statute provides that any person violating the provisions of articles 318–320 may be arrested without a warrant by any peace

officer upon information by some credible person. Not that any person who has violated may be arrested, and upon information given by any person. If the law demands strict proof in regard to the validity of warrants, and even then the liberty of the citizen is too sacred to indulge in presumptions against it, how much less should we indulge in presumptions in exceptional cases where, from the necessity of the case, the oath against liberty and the writ of the judicial officer is dispensed with? If the citizen is thus to be placed at the mercy of the peace officer, and it is the law that house can be invaded, not only without warrant, but without proof of the requirements in lieu of the warrant, and his liberty can be taken at the muzzle of the pistol, because the officer has received from some source information that a misdemeanor has been committed at some time not barred by the statutes of limitations, then the decision should be so plainly and forcibly expressed that it cannot be misunderstood.

If this be the law, many eminent attorneys prior to this time would in all honesty have mislead their clients by telling them that under such circumstances they could, by the adjudications of this court, resist such invasion of home and liberty even to the point of taking human life.

IV.

Errors of the Court on the Subject of Manslaughter.

Appellant further suggests to the court that there was error in the charge of the court below on the subject of manslaughter and also in refusing the special charges asked by appellant upon that subject in this: The court below limited the definition of "adequate cause" to the acts of Riddle and Early at the time of the killing, when really the "adequate cause" arose out of and was based upon other matters connected with and antecedent to the killing; important facts which should have been considered in connection with the facts occurring at the time of the killing. This feature of the charge was called to the attention of the lower court by a special exception and by special charges asked and refused and exceptions taken to such refusal. These errors were not commented on by this court and may have been overlooked, and appellant believes that upon a careful inspection thereof he will be held by this court to be entitled to a reversal of this cause.

By an unbroken line of decisions it is settled in this State that all the antecedent and surrounding circumstances must be considered by the jury in passing upon manslaughter in order to find the condition of the defendant's mind. This the appellant asked the court to instruct the jury to do in three distinct special charges (see Tr., pages 61, 62, and 63) and he refused to do so. The general charge is silent on this subject, and to that appellant specially excepted.

This court in the opinion herein, which we desire reviewed, say, "When Early appeared in front of his door with pistol in hand defendant had no right to apprehend unnecessary violence from either

Early or Riddle. Why? Because his own conduct and threats made it imperatively necessary for these officers to be thoroughly prepared and strictly on the *qui vive.*" The court further says, "That the defendant was expecting the officers to arrest him at any moment is also evident, for he was prepared, having his pistol in a position for immediate use and prompt action."

Substantially, this court holds that the officers, Riddle and Early, intended an arrest of the appellant, and that appellant anticipated an arrest by the officers.

Even if this was true, but the arrest illegal, the homicide would be of no higher grade than manslaughter and would be self-defense if appellant's life was apparently to him endangered while he was resisting arrest. Of course, if he was lying in wait for an opportunity to kill the officers, without reference to the arrest, and simply took advantage of an attempted arrest as an excuse or pretext to kill them, then it would be murder; but there is no proof of such pretext, and surely the court will not presume such pretext in the face of the law, which requires that they presume him innocent, and when the State's own evidence establishes beyond any doubt that appellant was at home quietly at work when the officers slipped upon him, and that they had their deadly weapons drawn on him when he fired.

Just here is the critical point in this case. The trial court and this court have both tried this cause and have both decided that a human life must be taken upon the scaffold, upon the theory expressed in the language of this court just quoted. If the court has erred in its theory or its reasons, a life will be wrongfully sacrificed. Appellant therefore begs this court to give this point the careful hearing that its terrible import to him demands. He believes that this court will frankly admit the error (if there be any) and save appellant from an infamous death and from leaving behind him the legacy of a- infamous character. Defendant says he had no reason to believe and did not believe that the officers intended to arrest him legally or without great violence, but that he did believe and had good reasons to believe that they did intend to inflict on him death or great bodily injury, and for that reason he kept his pistol near him.

This court says "he (appellant) had no right to apprehend unnecessary violence from Early or Riddle, because his own conduct and threats made it imperatively necessary for these officers to be thoroughly prepared and strictly on the *qui vive;*" 2, "the defendant was expecting the officers to arrest him at any moment was evident, for he had his pistol in a position for immediate use."

This case must be tried from the standpoint of appellant. Now, if the reasons given by the court will support the defendant's theory as strongly or more strongly than they will the court's theory, then the defendant's theory is proved; or if both are proved neither is proved, and the burden is certainly on the State. Let us assume that the officers intended personal injury to him, as he believed and feared. Would they not have been thoroughly prepared and strictly on the *qui vive?* Would they not have been more thor-

oughly prepared and more strictly on the *qui vive* if they intended to do him harm than if they merely intended to arrest him? Then, if these facts would more strongly support defendant's theory, why not assume that defendant's said theory was the more conclusively proven?

Again, there was certainly bad blood between them, as evidenced by the remarks of both. They were not personally acquainted, and their dislike seems to have been based on "official relations," and he disliked them as policemen, not as men. They had never arrested him, but he claimed that they had done him so much harm, outside of arrest, that his life was a burden. Then why should he now assume that they would change their conduct and arrest him, rather than inflict outside injury as before? Without intending the slightest to do more than try to aid the court in arriving at the natural effect of this proof, we most respectfully insist that in order to sustain this theory perfectly we must first assume that the officers intended no wrong, and then try this case from the standpoint of the officers.

Next, as to the effect of the defendant's having his pistol at hand. If he had anticipated that the officers intended to do him personal harm, would he not have had his pistol ready for "immediate use and prompt action"? Would he not more certainly have done so than if he only suspected an arrest? A man may or may not have his weapon close at hand to kill an officer whom he has threatened when he merely expects that officer will come and peaceably arrest him, but he is absolutely certain to have it ready if he expects that officer to attack him or expects that officer to illegally arrest him and then injure him.

Appellant did wrong when he talked of the officers as he did the day before the homicide, but surely this does not deprive him of the right of self-defense or of his rights as to the law of manslaughter, if the officers came at him the next day in such a way as to make him believe that he was in danger of death or serious bodily injury at their hands. The Texas reports are full of cases of officers who arrested their enemies and then killed or nearly killed them, notably Skidmore's case from Collin county, Giebel's case from Galveston county, and numerous others, and there have been many such cases that never got in the books.

Appellant believes that there also stands against him this view of the court: 1. The testimony establishing the previous good character of defendant; 2, Riddle's expression that "all he wanted was to get his hands on him;" 3, the proof that Riddle, when he started after defendant, said, "I don't believe that he will shoot;" 4, the testimony of George Miller that he knew the shooting was unexpected to Early; 5, and the further statement of the same witness, corroborated by all the others, that nothing was said about arrests in his complaint of the officers; 6, nor does any witness testify to a single word by defendant indicating any fear of arrest.

Should not the jury have been allowed and required to look into all the circumstances—not only those surrounding the homicide, but those antecedent thereto—in order that they might arrive at and

fully appreciate the motives, thoughts, or apprehensions which flashed through the appellant's mind and heart at the critical and trying moment when he looked up from his work over which he was bending and discovered all at once, in the twinkling of an eye and without a moment for reflection, that he was standing face to face with two armed men—not only armed, but with deadly weapons exposed and ready for immediate use? Only the evening before had he been informed of Riddle's words and talked and acted in his shop and on the street in such a manner (a manner absolutely unusual to him) that there can be no doubt that he feared these men and anticipated injury from them to such an extent that he pronounced his own life unendurable and threatened their lives and his own.

In Texas the decisions are unbroken that the trial judge must instruct the jury to consider all these antecedent circumstances in connection with and as lights upon the facts transpiring at the time of the homicide.

Error in Admitting Evidence.

The attention of the court is especially called to what appellant believes was an error of this court in passing upon evidence. Early, Miller, and Lemar had conversations among themselves as officers, indicating the purpose and intent of Early and Riddle to arrest appellant and their reasons for drawing their weapons when they sought appellant; also conversations between the officers and the witnesses Connerty and George Miller to the same effect and, further, to the remarks of the said witnesses Connerty and Miller to the effect that appellant was a dangerous man and would shoot the officers.

This testimony was fearfully damaging to the appellant before the jury and was strenuously objected to by appellant. Appellant not only had nothing to do with this hearsay evidence, but the parties manufacturing it took special pains to keep both the acts and words concealed from appellant. It justified the officers putting them in the best light before the jury, and, although Connerty and Miller's remarks were by Miller's own testimony and by Earl Roberts proven false, as well as hearsay, it put the defendant in the worst light possible. The court simply says "these facts were clearly competent; made so by the acts and threats of the defendant." How can this be and why is it true? The acts and words of an angry man on Monday are not only admitted with all their force against him (conditional threats of this kind made by deceased were held by this court in the Knowles case not to be threats—S. W. Rep., page 829, decided December 17, 1892), but all private acts and words by his enemies acting together against him on Tuesday, even while planning and talking against him because of his words and acts on Monday. It establishes this as the law when a defendant has made threats and demonstrations which are legitimate against him to show his motive because of his knowledge of and participation in them. The fact that he made such threats

and demonstrations makes legitimate as evidence against him all that is said and done by other parties, of which he knew nothing and a knowledge of which was purposely kept from him.

In other words, the acts and conversations of other persons, purely hearsay, can be used against defendant if the acts and conversations of said other persons are indulged in because of some prior wrongful acts or words by defendant. If it is true that a wrongful act of today will make legitimate against a man all that may be said and done by others in the future because of the wrongful act, then we have the new rule of law that a man's motives are construed and his guilt established, not by his own acts and words, but by the acts and words of other persons.

IV.

Errors and Formation of the Jury.

Appellant further prays the court to grant him a rehearing herein for the reason that the trial judge committed various errors during the selection and empanelling of the jury which resulted in the selection of a jury prejudiced against appellant and his case and preventing him from obtaining a fair and impartial trial. The record shows that eleven out of twelve jurors who tried appellant and sentenced him to death had formed and entertained at the time of their selection an opinion as to the guilt of appellant, and such opinion was fixed and established to such an extent that it would require evidence to remove it, and the record leaves no doubt that such opinion was against the appellant, the jurors promising (for what it was worth) the opinions thus formed would not influence their actions in finding a verdict. All of defendant's peremptory challenges were exhausted, so that the last juror, S. T. Morgan, who was objectionable to appellant, was forced upon him, although said juror had formed an opinion similar to the one entertained by the eleven jurors above mentioned.

Appellant was compelled to exhaust four of his peremptory challenges upon four jurors who declared that they had a bias and prejudice against defendant. Appellant's challenges for cause were overruled by the trial judge, who gives the following reasons for doing so:

"The jurors Worthington, Jasper, McLaughlin, and Ferguson, upon being challenged by defendant because of prejudice, were each examined by the court upon the question of prejudice against the defendant. They all answered that they did not know the defendant and never heard of him until they heard of his killing Riddle; that they had no animosity or ill-will against him, and that they could give him a fair and impartial trial. By this examination it was evident to the court that while the said jurors had upon examination by defendant's counsel stated that they were prejudiced against defendant they had misconceived the term prejudice, and that in fact they were without prejudice against him."

This court in its opinion did not mention the objection to any of the jurors except S. T. Morgan.

The above recital of facts in regard to the jurors, when taken in connection with other facts set out in the record, showing that appellant about four weeks before the trial was attacked by a mob—a shotgun was broken over his head, a rope placed around his neck; that he was dragged from the wagon to the streets and along the streets until it was thought that he was killed; that a large meeting of the citizens was held, at which the life of the appellant was demanded, and that a mob of immense size attacked the jail in order to kill appellant; and when it is further considered that appellant, being poor and almost unknown, could not because of the intense prejudice against him procure compurgators in an application to change the venue, and the court below refused to change the venue on his own motion or to postpone or to continue the same until the prejudice should somewhat abate, and when it is further shown in the record that one Henry Miller, a colored man, killed a policeman a short time before the death of Riddle, and that said Miller was convicted and the death penalty assessed against him a few days before appellant's trial and counsel for the State mentioned and discussed said Henry Miller's case before the jury in this case and the said counsel for the State in his argument and without proof charged this defendant with cohabiting with a negro woman in Dallas, all of these facts being considered, appellant says he has not had nor was it possible for him to have a fair and impartial trial in Dallas county.

This record presents this strange anomaly: The four jurors who in the court below said they had a bias and prejudice against appellant were decided by the trial court to be mistaken, because they were not personally acquainted with appellant, and yet appellant was held to be not only biased and prejudiced against Early and Riddle, but that he had express malice against them, although Early swore that he had never met the defendant in his life, and the record shows beyond question that Riddle had never met him. In other words, a condition of mind and set of circumstances which constitute express malice in a prisoner will not constitute bias or prejudice in the jurors that try him.

The premises considered, appellant prays that he be granted a rehearing herein, and that this cause be reversed and remanded for a new trial in the court below.

BASSETT, SEAY & MUSE,
Att'ys for Appellant.

Filed in court criminal appeals, at Dallas, this 18th day of Feb'y, 1893.

W. A. HUDSON, *Clerk.*

Filed in court of criminal appeals Mar. 31, 1893, at Austin, Texas.

P. WALTON, *Clerk.*

Assignment of Error in U. S. Supreme Court.

F. P. MILLER
vs.
THE STATE OF TEXAS.

On error to the Supreme Court of the United States.

Assignment of Error.

Now comes Franklin P. Miller, plaintiff in error in the above-entitled cause, and assigns the following errors apparent of record, for which he asks that said cause be reversed and remanded, to wit:

First Assignment of Error.

Petitionor in error was tried and convicted in the district court of Dallas county, State of Texas, of the 44th judicial district, on an indictment charging him with the murder of one W. H. Riddle, a policeman of the city of Dallas, Texas, and his punishment assessed at death.

On appeal to the court of criminal appeals of the State of Texas this judgment of conviction of the lower court was affirmed on the 21st day of January, 1893, said court of criminal appeals being the highest court of said State of Texas in which a decision of the said cause could be had.

A motion for rehearing was filed in said court of criminal appeals on the 18th day of February, 1893, and was by said court overruled on the 24th day of June, A. D. 1893.

The uncontradicted facts proven by the State and as appears of record in said cause show:

1. That the said W. H. Riddle, in company with another policeman of the city of Dallas, one Thomas Early, at the time of the homicide suddenly appeared in the door of the defendant's shop with drawn deadly weapons in their hands, consisting of large loaded pistols and a policeman's club, drawn upon the defendant, who, at the time of such appearance, was sitting at his shoemaker's work-bench engaged in work; that thereupon the defendant seized his pistol, which was at hand, and fired at said officers, killing said Riddle. The uncontradicted facts further show that said officers had no warrant of arrest; that they uttered no word nor made any statement as to their object in entering defendant's shop and presenting their weapons at him.

2. The claim of the State was that said officers intended to arrest defendant, petitioner here, and the uncontradicted facts further show that the alleged crime for which they claimed they undertook to arrest him was for unlawfully carrying a pistol openly in his hand on a public street on the day prior to the homicide, and the proof was that petitioner did carry said pistol openly and unconcealed in his hand and did not use or attempt to use the same; that said officers were notified of said offense on the day prior to said

pretended attempt at arrest and the day prior to the homicide, and no effort was made to procure a warrant of arrest for said alleged crime.

On the trial of the cause the trial judge instructed the jury as follows, to wit:

"If, on the day before the killing of the deceased, the defendant was on a public street of the city of Dallas carrying in his hand a pistol he was violating the laws of Texas, for which he was subject to arrest by any policeman of the city of Dallas, with or without warrant; and if the deceased, Riddle, and Early, being then policemen of the city of Dallas, were informed by any credible person of such violation of the law by defendant, it became their duty to arrest the defendant for such violation of the law, and it was not necessary before making such arrest that they should procure a warrant for the arrest."

The defendant, now petitioner, on the trial of said cause requested the court to instruct the jury as follows, to-wit:

* * * "You are instructed that an officer cannot lawfully arrest upon a charge of carrying a pistol without a warrant, unless the offense is then being committed or unless upon information of a credible person that the offense is being committed. Such arrest cannot lawfully be made without warrant after the offense has been completed and ended and defendant has gone to his home and the information is afterwards given to the officer of such facts;" and

"In relation to the attempted arrest of the defendant by Early and Riddle you are further instructed: (1.) That in making the arrest the officer is required by law to make known to the accused by what authority the arrest is made. (2.) It appearing upon the uncontradicted evidence in this case that Early and Riddle did not make known to the defendant by what authority the attempted arrest was made, you are instructed that the attempted arrest was unlawful and the defendant had the right to resist it. (3.) Unless you believe from the evidence that in making the attempted arrest Early and Riddle made known to the defendant by what authority the attempted arrest was made, such attempted arrest would be unlawful and the defendant would have the right to resist it."

Defendant's requested charges above quoted were by the trial court refused.

In the court of criminal appeals of the State of Texas these errors of the trial court were called to the attention of said court, and a reversal of said cause asked because of said errors, all of which is manifest in the record of said cause; but said court passed upon said questions and decided them adversely to the defendant. The said erroneous rulings and judgments against defendant, petitioner in this cause, were decided adversely to him in trial court and in said court of criminal appeals under and by virtue of the terms of certain statutes of the State of Texas, known as articles 318 and 322 of the Penal Code of the State of Texas, which said articles are as follows, to wit:

"Art. 318. Unlawfully carrying arms.—If any person in this State shall carry on or about his person, saddle, or in his saddle-bags

any pistol, dirk, dagger, slung-shot, sword cane, spear, or knuckles made of any metal or any hard substance, bowie-knife, or any other kind of knife manufactured or sold for purpose of offense or defense — shall be punished by fine of not less than twenty-five nor more than two hundred dollars, and shall be confined in the county jail not less than twenty nor more than sixty days."

"Art. 322. Arrest without warrant, officer failing punished.—Any person violating any of the provisions of articles 318 and 320 may be arrested without warrant by any peace officer and carried before the nearest justice of the peace for trial; and any peace officer who shall fail or refuse to arrest such person on his knowledge or upon information from some credible person, shall be punished by fine not exceeding five hundred dollars."

And petitioner in error avers that said provisions of said statutes, and the construction thereof, and the ruling of the said courts thereunder, infringe the right of petitioner as a citizen of the United States, and are in conflict with article two of the amendments to the Constitution of the United States, which provide- that "the right of the people to keep and bear arms shall not be infringed;" and the decision of the said court of criminal appeals of the State of Texas in reference thereto was against the right of petitioner, specially therein set up by him and such decision is here assigned as error.

Second Assignment of Error.

Petitioner avers that on the trial of the cause the trial judge instructed the jury as follows, to wit:

"If, on the day before the killing of the deceased, the defendant was on a public street of the city of Dallas carrying in his hand a pistol he was violating the laws of Texas, for which he was subject to arrest by any policeman of the city of Dallas, with or without warrant; and if the deceased, Riddle, and Early, being then policemen of the city of Dallas, were informed by any credible person of such violation of the law by defendant, it became their duty to arrest defendant for such violation of the law, and it was not necessary before making such arrest that they should procure a warrant for the arrest."

The defendant, now petitioner, on the trial of said cause requested the court to instruct the jury as follows, to wit:

"* * * You are instructed that an officer cannot lawfully arrest upon a charge of carrying a pistol without a warrant, unless the offense is then being committed or unless upon information of a credible person that the offense is being committed. Such arrest cannot lawfully be made without warrant after the offense has been completed and ended and defendant has gone to his home and the information is afterwards given to the officers of such facts;" and

"In relation to the attempted arrest of the defendant by Early and Riddle you are further instructed:

(1.) That in making an arrest the officer is required by law to make known to the accused by what authority the arrest is made.

(2.) It appearing upon the uncontradicted evidence in this case

that Early and Riddle did not make known to the defendant by what authority the attempted arrest was made, you are instructed that the attempted arrest was unlawful and the defendant had the right to resist it. (3.) Unless you believe from the evidence that in making the attempted arrest Early and Riddle made known to the defendant by what authority the attempted arrest was made, such attempted arrest would be unlawful and the defendant would have the right to resist it."

Defendant's requested charges were by the trial court refused.

Petitioner in error further avers that the terms of article 322 of the Penal Code of the State of Texas, which is as follows, viz: "Arrest without warrant.— * * * Any person violating any of the provisions of articles 318 and 320 may be arrested without warrant by any peace officer and carried before the nearest justice of the peace for trial, and any peace officer who shall fail or refuse to arrest such person on his own knowledge or upon information from some credible person shall be punished by fine not exceeding five hundred dollars."

(Art. 318 prohibits the bearing of pistols, &c., and is quoted above in the 1st assignment of error), and the construction and ruling of the court thereunder, as set forth above, are unconstitutional and in contravention of article four of the amendments to the Constitution of the United States, which provides that "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized," and that portion of article five of the amendments to the Constitution of the United States which says, "nor be deprived of life, liberty, or property without due process of law," and that portion of section one, article fourteen, of the amendments to the Constitution of the United States which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

Petitioner further avers that the judgment and rulings of the said court of criminal appeals of the State of Texas against him violated petitioner's rights under the Constitution of the United States to secure his house and person against unreasonable search and seizure, and that by said judgment and rulings petitioner was subjected to be deprived of his life and liberty without due process of law, and by their said judgment and rulings they enforced against him the statutes above set forth, to wit, arts. 318 and 322 of the Penal Code of the State of Texas, which said statutes as construed are laws abridging the privileges and immunities of citizens of the United States, and did abridge the privileges and immunities of petitioner as such citizen in that they authorized arrests without warrant, without due process of law, and under circumstances unjust and unreasonable, and deny him the equal protection of the laws. Peti-

tioner especially set up and claimed his said rights in said State courts, and their decision *were* against him and the same *are* here assigned as error.

Third Assignment of Error.

Petitioner in error says that it is manifest from the record in this cause that at the time of the homicide deceased Riddle, and his brother officer, Early, entered the house of defendant while defendant was busily engaged at his work therein; and that they gave him no notice of their intentions and purposes nor did they by word or act indicate to defendant any other intention than to murder or maim him, and then and there presented at him drawn deadly weapons; that it was in defense of his person against the unlawful, unreasonable, and tyrannical attempted seizure of defendant that he fired upon and slew deceased; that even if said officers had the right to arrest the defendant the manner and mode of said attempted arrest was illegal and threatening and such as forced said defendant to believe that his life was in danger, and was in violation of said defendant's constitutional privileges and immunities as a citizen of the United States under the Constitution thereof.

Petitioner in error further avers that his rights to protect himself from such unlawful and unreasonable seizure and arrest is guaranteed to him by the provisions of the Constitution of the United States, as found in the amendments thereto, articles 4, 5, and section 1, article 14, which said articles are as quoted above.

Petitioner in error, with a view of securing his constitutional rights, requested the trial court to charge the jury as follows, to wit:

"In relation to the attempted arrest of the defendant by Early and Riddle you are further instructed: (1.) That in making an arrest the officer is required by law to make known to the accused by what authority the arrest is made. (2.) It appearing upon the uncontradicted evidence in this case that Early and Riddle did not make known to the defendant by what authority the attempted arrest was made, you are instructed that the attempted arrest was unlawful and the defendant had the right to resist it. (3.) Unless you believe from the evidence, that in making the attempted arrest Early and Riddle made known to the defendant by what authority the attempted arrest was made, such attempted arrest would be unlawful and the defendant would have the right to resist it."

Which requested instruction was refused by said trial court. In the said court of criminal appeals of the State of Texas this error was called to the attention of said court and a reversal of the judgment of said cause asked because of said error, all of which is manifest in the record, but said court of criminal appeals of the State of Texas passed upon said question and decided the same adversely to the defendant; all of which is here assigned as error.

Respectfully submitted. ROB'T B. SEAY,
Attorney for the Petitioner in Error, F. P. Miller.

UNITED STATES OF AMERICA:

The President of the United States to the honorable judges of the court of criminal appeals of the State of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in said court of criminal appeals before you, between Franklin P. Miller, who is appellant, and the State of Texas, who is appellee, No. 91 on the docket of said court of criminal appeals, a manifest error has happened to the great damage of said F. P. Miller, who is plaintiff in error herein, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be there given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within thirty days from date thereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done, and that the execution of said judgment be stayed until this writ of error is disposed of, and to that end that the sheriff of Dallas county, Texas, be also served with a copy hereof.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 16th day of August, in the year of our Lord one thousand eight hundred and ninety-three, and in the 117th year of the Independence of the United States.

W. A. HUDSON,

[SEAL.] *Clerk Court Criminal Appeals of Texas, at Dallas.*

Allowed: J. M. HART,

Presiding Judge of the Court of Criminal Appeals of Texas.

(Endorsed:) Came to hand Aug. 17, 1893, and was executed on Aug. 17, 1893, at 4.50 p. m., by delivering to Ben. E. Cabell, sheriff of Dallas Co., Tex., in person, a true copy of this writ. W. F. Morton, constable pre. No. 1, Dallas county, Tex.; F. H. H. Jacobey, dept. Filed Aug. 18th, 1893. W. A. Hudson, clerk court criminal appeals, Texas, at Dallas.

1166

Office Supreme Court U. S.
FILED.
MAR 31 1894
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

FRANKLIN P. MILLER, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS.

Motion to Dismiss Writ of Error.

C. A. CULBERSON,
Attorney General of Texas.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

FRANKLIN P. MILLER, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS.

Motion to Dismiss Writ of Error.

Now comes the State of Texas, by C. A. Culberson, its attorney general, and moves the Court to dismiss the writ of error herein, because:

(1.) The writ of error is void, having been issued and tested by the clerk of the court of criminal appeals of the State of Texas.

(2.) No Federal question is presented by the record.

(3.) If a Federal question is presented by the record it was not presented in time and this Court is without jurisdiction.

C. A. CULBERSON,
Attorney General of Texas.

To Jo Abbott, Esq.,
Counsel for Plaintiff in Error:

Take notice that the above motion will be submitted to the Supreme Court of the United States on Monday, April 23, 1894, or as soon thereafter as the Court will entertain it.

C. A. Culberson,
Attorney General of Texas.

Service of the foregoing motion is accepted.

Jo Abbott,
Counsel for Plaintiff in Error.

March 31, 1894.

BRIEF ON MOTION TO DISMISS.

STATEMENT OF THE CASE.

The plaintiff in error was indicted for the murder of W. H. Riddle by the grand jury of Dallas county, Texas, on the 18th day of June, 1892. He was convicted July 23, 1892, and sentenced to be hanged. From the judgment of the district court of Dallas county, before which he was tried, he appealed to the court of criminal appeals of the State of Texas, the court of last resort in criminal matters, and the judgment was affirmed January 21, 1893. A motion for a rehearing was overruled June 24, 1893. By reference to the amended motion for a new trial, the assignment of errors in the court of criminal appeals, and the opinion of the court, it will be seen that no Federal question was up to that time pretended to have been raised. For the first time a Federal question is sought to be presented in the amended motion for a rehearing before the court of criminal appeals, where it is said generally that the statement of facts in the case "calls for a decision" upon certain supposed questions arising under the Constitution of the United States (side page 177). While it is not clear, yet it seems these questions have reference to the right of the citizen to be secure in his person, houses, papers, and possessions from unreasonable searches and seizures, his right to bear arms, and that warrants for arrest shall be based upon oaths or affirmations.

By the assignments of error in this Court it is insisted by plaintiff in error that Federal questions are presented by the record, because—

(1.) Articles 318 and 322 of the Penal Code of Texas, which prohibit the carrying of arms under certain conditions and authorize the arrest without warrant of persons

violating the same, as construed by the court of criminal appeals, infringe the right of the citizen under article 2 of the amendments to the Constitution of the United States to keep and bear arms.

(2.) That certain instructions of the trial court, held proper by the court of criminal appeals, deprived plaintiff in error of his right under the Constitution of the United States to be free from unreasonable searches and seizures.

First.

The writ of error issued and tested by the clerk of the court of criminal appeals of Texas is insufficient to give this court jurisdiction.

Bondurant *vs.* Watson, 103 U. S., 278.

Second.

No Federal question is presented by the record. The prohibitions contained in the second and fourth amendments to the Constitution of the United States, alleged to have been violated in this case, are restrictive of Federal authority only.

Twitchell *vs.* Commonwealth, 7 Wall., 321.

Spies *vs.* Illinois, 123 U. S., 131.

If it were otherwise the provisions of the Penal Code of Texas as to carrying arms and arrests without warrant are reasonable and necessary exercises of the police powers of the State and beyond interference by the authorities of the United States.

See Cockrum *vs.* State, 24 Texas, 394.

State *vs.* Jumel, 13 La. An., 399.

Third.

The supposed Federal questions having been raised for the first time in the motion for a rehearing, they were not presented in time.

Spies *vs.* Illinois, 123 U. S., 181.
R. R. Co. *vs.* R. R. Co., 137 U. S., 48.
Caldwell *vs.* Texas, 137 U. S., 698.

C. A. CULBERSON,
Attorney General of Texas.

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

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In the Supreme Court of the United States.

FRANKLIN P. MILLER, PLAINTIFF IN ERROR.

VS.

THE STATE OF TEXAS.

Answer of Plaintiff in Error to the motion of the State of Texas, to Dismiss the Writ of Error.

JO ABBOTT, AND
ROBT. B. SEAY,
Attorneys for Plaintiff in Error.

John F. Worley, Printer, Dallas, Texas.

In the Supreme Court of the United States.

FRANKLIN P. MILLER, PLAINTIFF IN ERROR.

VS.

THE STATE OF TEXAS.

Answer of Plaintiff in Error to the motion of the State of Texas, to Dismiss the Writ of Error.

STATEMENT OF CASE.

Plaintiff in error denies that the Federal questions raised in this proceeding were raised for the first time in the amended motion for a new trial. Reference to the record will show that they were raised in the trial court by requested charges, and exceptions to the charge of the judge. Then again in the motion for new trial and in each successive proceeding to the final termination of the case in the Court of Appeals. True they were not called constitutional rights, nor is this necessary. If the principle involved is a constitutional one it is not necessary to brand it with any name. The same principles which were insisted on by the defendant in the trial court, are the identical constitutional principles he relies on here.

If this proposition be correct it is an answer to the third point in the motion to dismiss, and to the third prop-

osition discussed by the Attorney General for the State of Texas.

Answer to the First Proposition.

The writ of error herein is obnoxious to none of the objections specified in Bondurant vs. Watson cited. It is in accordance with Sec. 1004, Rev. Stat., and is the form transmitted to the clerks under that statute. It runs in the name of the President of the United States, and bears the test of the chief justice of this court.

Secs. 998, 999 and 1004, Rev. Stat., require that the writ shall be signed by the judge and clerk of the United States Court rendering the judgment. Sec. 1003 provides that writs from State Courts "shall be issued in the *same manner*, and under the *same regulations*, and shall have the *same effect* as if the judgment had been rendered in a court of the United States." Taken together these statutes mean that the writ should be signed by the judge and clerk of the court from which it comes, and this has been done. See Sheppard vs. Wilson, 5 Howard, 210.

Answer to Second Proposition, Sub-division 1.

It is admitted that in Twitchell vs. Pennsylvania, 7 Wall., 321, cited by defendant in error, and in the cases therein cited it is held that the amendments to the constitution "contain no expression indicating an intention to apply them to State governments." This, however, was prior to the 14th amendment which does contain such expression, and which was intended to prevent States, and State authorities from depriving citizens of their rights under the constitution of the United States. This construction we understand has been given it in Caldwell vs.

Texas, 137 U. S., 698. The same question had been previously raised in Spies vs. Illinois, 123 U. S., 181, but this court did not pass on it then because it was not involved in the case.

In Ex-parte Ulrich, 42 Fed. Rep., 587, and cases cited it is held that the Federal courts will, under the 14th amendment, protect any citizen who, by any agency of the state, is "deprived of life, liberty or property without due process of law," citing *Ex-parte Ah Lee*, 5 Fed. Rep. 899, which last case cites Justice Strong's opinion in *ex-parte Coles*. One of the "privileges and immunities" of the citizen under the 2nd amendment is to resist illegal arrests and seizures if the constitution is properly construed, and the 14th amendment provides that "no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States." Only a semicolon stands between these two clauses of the 14th amendment. If one is enforced the other should be.

Answer to Second Proposition, Sub-division 2.

It is claimed in substance in this proposition that plaintiff in error has been deprived of no constitutional right by the laws of Texas. We insist that the effect of the judgment against plaintiff was to hold: 1, That it was an offence against law for a citizen to carry a pistol openly and unconcealed in his hand. 2, That officers of the law could without warrant arrest such citizen the next day after such offence was completed. 3, That in order to effect such arrest, the officers had the right to enter the home of the citizen with deadly weapons drawn on him. 4. That the citizen could not resist such arrest so made, and if he

did so resist and killed such officers he would be guilty of murder upon express malice.

Plaintiff in error submits that such holdings are contrary to the well established law holding such attempted seizure and arrest to be both unlawful and unreasonable, and in violation of the letter and the spirit of the 2d, 4th, and 14th amendments to the constitution of the United States.

These propositions are elementary. That it is the duty of this court to retain and pass upon these questions, and not dispose of them upon motion we refer to the Slaughter House Cases, 16 Wall., 36.

JO ABBOTT, AND
ROBT. B. SEAY,
Attorneys for Plaintiff in Error.